

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE BRYAN LINDEL ADAIR,
doing business as Bryan Adair
Construction Company, doing business
as Graystone Cement Company, doing
business as Liberty Trucking, doing
business as Viking Concrete Company,

Debtor.

BAP No. EO-06-078

BRYAN LINDEL ADAIR,

Appellant,

v.

OKLAHOMA TAX COMMISSION,

Appellee.

Bankr. No. 03-71906
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before CLARK, NUGENT, and McNIFF, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument. Debtor appeals the bankruptcy court's order denying his objection to the claim filed by

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

appellee Oklahoma Tax Commission (“Commission”). We affirm.

I. ISSUES AND STANDARD OF REVIEW

The parties stipulated to the facts, and the sole issue on appeal is whether Debtor is personally liable, under Oklahoma law, for sales taxes that were charged by his company but paid by the company’s customers to a third party. This Court reviews a trial court’s legal conclusions that are based on uncontested facts *de novo*.¹ This Court must also reach its own conclusions regarding state law legal issues, without deferring to the bankruptcy court’s interpretation of state law.²

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.³ Because the notice of appeal was timely filed within ten days of a final order, and because neither party to this appeal has elected to have the appeal heard by the district court, this Court has appellate jurisdiction.

III. BACKGROUND

During the relevant time period, Debtor was the President of Viking Ready Mix, Inc. (“Viking”). In March and April 2003, Viking made sales and billed its customers for those sales, including sales tax. Prior to that time, Viking had pledged its accounts receivable to BankOne (“Bank”). Because Viking was in default on its debt to Bank, Bank collected Viking’s accounts pursuant to its rights as a secured creditor, including payments made on the March and April

¹ *Hofer v. Unum Life Ins. Co. of America*, 441 F.3d 872, 875 (10th Cir. 2006); *In re Thompson*, 240 B.R. 776, 779 (10th Cir. BAP 1999).

² *Kelaidis v. Cmty. First Nat’l Bank (In re Kelaidis)*, 276 B.R. 266, 270 n.1 (10th Cir. BAP 2002).

³ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

2003 sales. Thus, neither Viking nor Debtor ever directly received any of the funds that were paid by Viking's customers during the relevant time period. Viking did file sales tax returns for those two months, showing the entire amount of taxes billed, and made partial payment of them with the April return. Debtor, individually, filed for Chapter 7 relief in May 2003. The Commission assessed Debtor, as President of Viking, for the delinquent sales taxes.⁴

The relevant provisions of the Oklahoma Code are Oklahoma Statutes title 68, sections 253 and 1361. Section 1361(F) imposes a fiduciary duty on vendors for sales taxes:

Any sum or sums collected or accrued *or required to be collected* or accrued in Section 1350 et seq. of this title shall be deemed to be held in trust for the State of Oklahoma, and, as trustee, the collecting vendor or holder of a direct payment permit as provided for in Section 1364.1 of this title shall have a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state.⁵

Debtor contends that a plain reading of this statute reveals that the legislature intended to impose a trust only on funds that actually come into the hands of a collecting vendor. Thus, he claims that “[i]t is impossible to hold funds in trust which are never in one’s possession.”⁶ However, the Oklahoma legislature’s use of the phrase “or required to be collected” in the statute implies just the opposite, since fiduciary duties are imposed on vendors whether or not they actually collect the taxes owed, as long as they are required by law to collect them.

Debtor’s personal liability is based on § 1361(A), which provides in part that, “[e]very person required to collect any tax imposed by Section 1350 et seq. of this title, and in the case of a corporation, each principal officer thereof, shall

⁴ Ultimately, the Commission’s claim against Debtor was in the amount of approximately \$33,000.

⁵ Okla. Stat. tit. 68, § 1361(F) (2006) (emphasis added).

⁶ Appellant’s Opening Brief (“App. Br.”) at 5.

be personally liable for the tax.” In addition, § 253 provides that, “liability of a principal officer for sales tax . . . shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986” The Internal Revenue Code imposes a penalty on anyone who is required to collect taxes and willfully fails to collect, account for, or pay such tax.⁷ In order to be held personally liable under this statute, one must be a “responsible person,” who has a duty to collect, account for, and pay over taxes.⁸ Debtor admits that, pursuant to these statutes, he would have had a duty to pay sales taxes that were actually collected by Viking.⁹ However, he contends that no such duty arose because neither he nor Viking ever actually possessed the taxes that were paid and, therefore, had no duty to remit them.¹⁰

Both the Commission and the bankruptcy court relied on *Lee v. United States*¹¹ to find Debtor liable in this case. In *Lee*, as here, the corporate officers admitted that they would ordinarily be considered “responsible persons” under federal law, but for the existence of a lockbox arrangement with the company’s bank. Pursuant to the lockbox arrangement, all of the company’s income was diverted to the bank, which first satisfied the company’s debt to it, then allowed

⁷ I.R.C. § 6672(a) (2007).

⁸ *Heimark v. United States*, 18 Cl. Ct. 15, 20-21 (1989) (relying on *Godfrey v. United States*, 748 F.2d 1568, 1574 (Fed. Cir. 1984)).

⁹ App. Br. at 7.

¹⁰ Debtor cites a 1963 Texas District Court case in support of this proposition, *Lowe v. United States*, 224 F. Supp. 569 (S.D. Tex. 1963). That court’s determination of non-liability was based, at least in part, on its finding that the defendant had not acted willfully. However, as noted by the bankruptcy court in this case, the Oklahoma statutes do not require a finding of willfulness. To the extent that *Lowe* stands for the proposition Debtor asserts, we find it to be unpersuasive.

¹¹ 951 F.Supp. 79 (W.D. Pa. 1997).

the company to use the remainder, if any, to pay operating expenses. All checks written on the company's operating accounts, including payroll, were required to be authorized by the bank. The IRS asserted that three company officers were personally liable for withholding taxes that the company had not paid. The officers' objection to the assessments, on the ground that they could not be "responsible persons" because they did not control the funds, was rejected by the district court, which stated that "the duty to pay employment taxes that have been withheld is a statutory one, and cannot be delegated away by a financing agreement."¹²

Debtor contends that *Lee* is distinguishable because, unlike the sales taxes in this case, which were paid directly to the bank, the company in *Lee* actually possessed the taxes that were withheld from its employees' paychecks. However, contrary to this assertion, it appears that the tax funds in *Lee* were in fact possessed by the bank. The bank controlled both the company's income and its operating accounts, and both paychecks and tax payments required the bank's authorization. Thus, the taxpayer in *Lee* had no more "possession" of the funds deducted from its employees' checks than did Viking. In both cases, the tax funds were within the bank's control of the corporate accounts.

We agree with the bankruptcy court's conclusion that actual possession of sales tax remittances is not necessary to Debtor's liability for those taxes under Oklahoma law. Debtor does not contend that he had no duty to collect sales tax on sales made by Viking. Pursuant to § 1361(F), the duty to collect a tax includes a duty to pay that tax, even if the buyer fails to pay them or pays them to another entity. That is particularly the case where, as here, Debtor's company voluntarily redirected its customer payments to a third party.

¹² *Id.* at 82.

IV. CONCLUSION

The bankruptcy court's judgment denying Debtor's objection to the Commission's claim is therefore affirmed.